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LAWYERS
ASSOCIATION

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OMB Control: 1615-0040

Docket ID USCIS-2005-0035

**Re: Agency Information Collection Activities; Revision of a Currently Approved Collection:
Application for Employment Authorization**

To Whom It May Concern:

I. Introduction

The American Immigration Lawyers Association (AILA) submits the following comments in response to U.S. Citizenship and Immigration Service's (USCIS) request for comments on the Form I-765, Application for Employment Authorization, published in the Federal Register on July 8, 2022.¹

Established in 1946, the American Immigration Lawyers Association (AILA) is a voluntary bar association of more than 16,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, legal permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

AILA understands that this request is based on an information collection notice previously published in the Federal Register on March 29, 2022, at 87 FR 18078, titled "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers". However, given the changes made to the Form I-765, and its instructions, AILA wanted to renew the important requests made in our June 3, 2022 comment² pertaining to the structure of the Form I-765 and its instructions, the need for a review of the overall length of the form and its instructions, and changes needed in order to avoid confusion after the *Asylumworks v. Mayorkas* decision.

¹ 87 FR 40855 (July 8, 2022)

² AILA Submits Comments on Form I-765, Application for Employment Authorization,
<https://www.aila.org/infonet/form-i-765-application-for-employment-authorizati>

II. General Comments

A. *Form I-765 Length and Structure*

The 01/17/17 edition of Form I-765, Application for Employment Authorization, consisted of two pages. The current edition has ballooned to seven pages, a 250% increase from the 1/17/17 form iteration, and a 600% increase from 2015.³ The form is also accompanied by 31 pages of instructions.

The layout of the current seven page 08/25/20 edition of Form I-765, combined with inadequate identification of relevant information in the 31 pages of instructions, overly complicates the application and unnecessarily adds to the burden of completing it. All the additional data points appearing on the current form do not appear to be essential for USCIS to perform its adjudicatory functions. Instead, the additional data captured appears to add time to the adjudication process without adding clarity.

As currently promulgated, Form I-765 seeks to gather information required for each of the many different bases on which a foreign person may qualify for temporary employment authorization in the United States. The result is a ponderously long document that may have the effect of intimidating non-native speakers or those with limited educational backgrounds.

To start, neither the Form I-765, nor its accompanying instructions adequately signal which sections pertain to each specific eligibility category. To further address what currently appears as a long, unitary application and instructions, AILA recommends that both the form and its instructions should be separated into a base document accompanied by multiple supplements. The base form should gather the biographical details required of all EAD applicants. This would gather the material now covering the first 2.5 pages of Form I-765 which previously had been contained within the first page of the 01/17/17 edition. The information gathered by question 27—the eligibility category—should both direct applicants to the instructions to ascertain their eligibility category and inform them to attach the appendix corresponding to that category.

In their current form, the instructions appear as one long, 31-page set of requirements. The instructions should clearly identify the eligibility category to which they pertain. More definitively separating instructions for each eligibility category by use of space, font, or other devices, would greatly facilitate the application process, enhance the efficiency of the preparation process, and reduce the time required to complete an application. Finally, language should be added to the instructions and prominently displayed that states that applicants are required to provide only the documents pertaining to their specific eligibility category.

Separating information pertaining to different eligibility categories into distinct appendices and different sections in the instructions should allow applicants to more clearly understand that only information appropriate to their eligibility category is required. This approach should make completion of the form more efficient for applicants. Equally important, this structure also should

³ GAO Report, U.S. Citizenship and Immigration Services: Actions Needed to Address Pending Caseload (Aug. 18, 2021), <https://www.gao.gov/products/gao-21-529>

allow adjudicators to quickly ascertain that the correct information was provided when reviewing applications for each of the several eligibility categories.

B. Duplicative Instructions that Appear on Both Form I-765 and Its Instructions

The 08/23/20 edition of Form I-765 is unnecessarily long, in part due to instructions that appear on both the form and in the instructions. AILA recommends that USCIS review the Form I-765 and its instructions and where clarity or comprehension would not be compromised, limit redundancies in instructions being provided in both documents.

C. Information Not Included in Written Instructions

AILA recommends that USCIS place applicants on notice that not all information relating to the filing of Form I-765 appear in the accompanying form instructions. For example, additional requirements relating to the coding of the employment eligibility category appear on the USCIS website.⁴ Specifically, applicants applying for adjustment of status seeking a combination card providing both employment authorization and Advance Parole travel authorization should indicate their eligibility category is (c)(9)(P) rather than (c)(9) for those seeking only employment authorization. The current instructions provide no hint of this requirement.

AILA urges USCIS to review the information currently included both in and outside of the Form I-765 instructions document and ensure that applicants, stakeholders, and representatives are adequately able to access relevant guidance for their respective applications.

III. Specific Observations and Comments

A. Questions 30b.-g. and Language Pertaining to Restrictions on Eligibility for Work Permits for Certain Asylum Seekers

AILA urges USCIS to promptly update both Form I-765, as well as its instructions, to reflect the updates to USCIS policy and procedure in light of the *Asylumworks v. Mayorkas* (the *Asylumworks* decision) decision, remove any outdated questions from the Form I-765, and to effectively advise applicants of the information that they are required to provide on both its website and the form's instructions.

Effective February 8, 2022 USCIS stopped applying the Asylum EAD Rule after a February 7, 2022 decision in *Asylumworks* vacated it, as well as the Timeline Repeal Rule.⁵ AILA thanks USCIS for updating its website on the “Asylumworks” webpage⁶, and the Form I-765 landing page specifically to reflect this information. While the guidance provided is helpful, both pages contain a significant amount of information which might result in applicants missing important updates.

⁴ Filing Form I-765 with Other Forms, available here: <https://www.uscis.gov/forms/all-forms/filing-form-i-765-with-other-forms> (Last updated Mar. 4, 2021)

⁵ See USCIS Stops Applying Certain EAD Provisions for Asylum Applicants, <https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notice-and-agreements/uscis-stops-applying-certain-ead-provisions-for-asylum-applicants> (Last reviewed/updated Apr. 28, 2022)

⁶ *Id.*

In addition, some of the information included on the *Asylumworks* page is not reflected on the Form I-765 landing page, which could lead to confusion among applicants and stakeholders. This may limit stakeholders' understanding of these changes and the resulting guidance from USCIS as it pertains to filing a Form I-765 moving forward.

First, in light of the *Asylumworks* decision, USCIS has stated on its website that applicants no longer need to answer questions 30b.-g. concerning whether they lawfully entered the United States through a port of entry.⁷ AILA recommends that USCIS remove these questions as quickly as possible from the form in order to reduce confusion, update the instructions accordingly, and ensure that this information is prominently displayed on the Form I-765 landing page, and not just the *Asylumworks* webpage.

In addition, USCIS has issued an announcement that it no longer requires applicants in the c(8) category to pay a biometric services fee or attend an ASC appointment for the Form I-765. AILA recommends that the agency update the Form I-765 instructions to instruct applicants in the c(8) category should not submit the \$85 biometrics services fee, especially considering that as stated on the Form I-765 and *Asylumworks* pages, filing of an EAD application with the fee may result in an application being rejected for overpayment.

B. Question 30a. Concerning the Arrest and Criminal Records of Applicants

AILA notes that confusion and concern remain concerning question 30a. on the Form I-765. On October 22, 2019, AILA's Asylum and Refugee Committee sent a letter⁸ to then Acting Director Kenneth Cuccinelli concerning what this question, and what AILA believes is an overbroad request for all criminal and arrest records, regardless of whether the underlying incident resulted in a conviction. Under 8 CFR § 208.7 asylum seekers who have been convicted of aggravated felonies under INA § 101(a)(43) cannot be granted an EAD. This regulation does not extend that restriction to asylum seekers that were arrested but not convicted of aggravated felonies. Despite this, Form I-765 includes a question asking whether an applicant has ever been "arrested for and/or convicted of a crime."⁹ The form and its accompanying instructions request this information irrespective of whether an underlying incident resulted in conviction.

In our letter we highlighted several reasons that USCIS should change this language. The requirement for both arrest AND criminal records sweeps in information that is not relevant to the assessments concerning aggravated felonies the agency is intending to conduct. Furthermore, arrests abroad may have resulted in limited documentation, and actually compromise an asylum claim where another government wrongfully arrested an individual. This could create a chilling effect on applicants with baseless charges that form the basis of their asylum claims. Finally, the impact of an unjust adjudication created by the collection of this information may result in applicants needing to wait several years for the adjudication of their asylum case before they are able to support themselves.

⁷ *Id.*

⁸ See AILA Urges USCIS to Modify Overbroad I-765 Requirement Affecting Asylum Seekers, <https://www.aila.org/advo-media/aila-correspondence/2019/aila-urges-uscis-to-modify-overbroad-i-765> (Oct. 22, 2019)

⁹ I-765, Application for Employment Authorization, <https://www.uscis.gov/i-765>

AILA recommends that USCIS modify Question 30a. and relevant instructions to ensure that USCIS is limiting the intake of information and documentation to whether the individual was in fact convicted of an aggravated felony under INA § 101(a)(43) and (2) certified records of conviction, not arrest records, for those instances provided. For more information, please review AILA's October 2019 letter.

C. Interpreters and Preparers

Form I-765 is unnecessarily lengthened by the inclusion of pages gathering information about potential interpreters and preparers. Not all applicants require or utilize an interpreter. Those that do, should be directed to attach an appropriately designated supplement. Similarly, not all applicants require or utilize a preparer. Again, directing those that do use a preparer to attach a supplement *or* a Form G-28, Notice of Appearance as Attorney or Accredited Representative would streamline and simplify the form.

The information gathered on a Form G-28 includes all relevant data points currently appearing in Part 5 of Form I-765 which covers the entirety of page 6 of the application. Those applications accompanied by a Form G-28 should not be required to devote the additional time and resources to complete duplicative "preparer" information and legal representative information. The cumulative time savings is incalculable.

Furthermore, the instructions corresponding with Part 5 should be revised. As currently worded, the instructions create an ambiguity about whether an application prepared by an attorney or Accredited Representative must include a Form G-28 to be recognized as a representative. The instructions use the permissive "may" rather than the mandatory "must" when indicating that a Form G-28 should accompany the application. USCIS should either clarify circumstances in which a legal representative will be recognized without a Form G-28 or use mandatory language in the instructions to remove all doubt.

D. "Other Names Used"

Approximately one third of page one of the Form I-765 is devoted to gathering the applicant's name. Most of the space absorbed by this request calls for alternate names. The merits of adding to the length of the form in this manner are not apparent given that Part 6 of the form provides space for additional information, if any, for which there was inadequate space in the body of the form. Page 20 of the instructions already provides information about how to add information for which there is insufficient space on the form. Devoting an entire page to Part 6 which may not be required by an applicant contributes to waste, particularly for those filing on paper.

AILA recommends that USCIS remove the questions pertaining to alternate names and instead instruct applicants to include this information, where necessary, in the space provided in Part 6 for additional information.

E. Instructions Related to Biometrics Services Appointments

The note in Part 3 of the Form I-765, states that applicants file Form I-765 when present in the United States. Page 20 in the instructions pertaining to biometrics appointments, however, indicates that applicants who are “overseas” will be instructed to contact a U.S. consular post or USCIS office outside the United States if a biometrics appointment is required. While these two sets of instructions appear to allow for circumstances where an applicant is present in the U.S. at the time that an EAD application is filed and subsequently departs, clearly articulating this policy to remove ambiguity is necessary.

AILA recommends that USCIS ensure that the information related to biometric service appointments available in Part 3 of the application is the same as the information on page 20 of the instructions.

F. Return of Original Documents

The instructions indicate on page 20 that original documents will be returned when USCIS “no longer needs” them. There is no indication of how long or what event may occur that would cause USCIS to determine that it requires original documents or when it no longer needs them. Furthermore, there is no instruction on how petitioners or beneficiaries may contact USCIS to request return of an original document.

AILA recommends that USCIS provide guidance on the length of time it expects to retain original documents, circumstances that will cause USCIS to return original documents, and instructions on how and where to request return of original documents requested by USCIS.

G. Spouses of L or E Principal Nonimmigrants

Instruction numbers 4 and 5 under the heading of “Employment-Based Nonimmigrant Categories” on page 10 should be revised to clearly indicate that the spouse of an L or E principal nonimmigrant is not required to apply for an EAD. AILA recommends that USCIS update the form instructions to confirm that obtaining an EAD for such dependent nonimmigrant spouses is optional rather than mandatory.

H. Factors That Prompt a Request for Interview

The instructions indicate on page 29 that USCIS may require applicants to “appear at a USCIS office for an interview based on your application.” To avoid unnecessary economic cost and delay associated with traveling a significant distance to attend an interview, AILA recommends that USCIS clarify in the instructions when an applicant would need to appear at a USCIS office for an interview. Such a delineation of factors need not be comprehensive. Examples may be used for purposes of putting the public on notice of when USCIS may impose this requirement.

I. Instructions for Scheduling a Local USCIS Appointment

Finally, the instructions for Form I-765 indicate on page 30 that applicants can schedule an appointment online at www.uscis.gov to obtain assistance at a local USCIS office. This is not currently an option on the USCIS website, as applicants must now instead utilize the USCIS

Contact Center and InfoMod system to schedule a local appointment. USCIS should update the instructions, as well as all pages on its website that mention the previous self-scheduling InfoPass process to reflect the new process for scheduling a local USCIS office appointment.

IV. Conclusion

AILA appreciates the opportunity to comment on the Form I-765, and we look forward to continuing dialogue with USCIS on how a thorough review of certain forms can make for a more efficient and clear process for both customers and agency staff. Please address any concerns or questions to AILA Director of Government Relations Sharvari Dalal-Dheini at SDalal-Dheini@aila.org.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION